

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

BARRETT LANCASTER BROWN

No. 3:12-CR-317-L

3:12-CR-413-L

ECF

GOVERNMENT’S RESPONSE TO BROWN’S MOTION TO UNSEAL

On November 17, 2014, Brown filed a Sentencing Memorandum *under seal* pursuant to this Honorable Court’s instruction.¹ The Sentencing Memorandum requested that this Court impose a non-guideline sentence. Per this Court’s Amended Sentencing Scheduling Order, the Court ordered that “[i]f Defendant plan[ed] to request the court to impose a sentence outside the Guidelines range because of the sentencing factors pursuant to 18 U.S.C. § 3553(a), Defendant must file a **sealed** Memorandum for Non-Guideline Sentence and set forth argument and evidence that would support such a sentence.” [Paragraph 7, Document 120 (3:12-CR-317) and Document 85 (3:12-CR-413)].

On December 11, 2014, Brown filed a Motion to Unseal Sentencing Memorandum and Exhibits. To justify its motion, the defense claimed it “received a number of media

¹ The defense filed the Sentencing Memorandum *under seal* on November 17, 2014. As such, it was *not* identified in Pacer (see Exhibit 1) and *not* made public. However, on the same day, someone publicized the existence of the document. As a result, Mr. Gallagher posted two messages on the @FreeBarrett_ Twitter account acknowledging the filing of the Sentencing Memorandum and commenting on some content from the document. (see Exhibit 2).

inquiries from domestic and foreign media outlets requesting the public release of Mr. Brown's Sentencing Memorandum in advance of sentencing." The government surmises that the fortuitous Twitter postings regarding the existence of the sealed Sentencing Memorandum spawned the media interest. In its Motion to Unseal, the defense summarily relied on the First Amendment, common law, and cited a Northern District of New York case. The Motion further represented that Brown would waive any privacy interest he had in the Sentencing Memorandum.

First, the government requests clarification as to what the defense seeks to unseal. The only items "filed" under seal were the Sentencing Memorandum and Exhibits A and D. However, the Sentencing Memorandum referenced Exhibits B² and C³, which were submitted to this Honorable Court *In Camera*. First the Government addresses the "filed" documents.

Assuming *arguendo* that Brown does execute a proper waiver *and* that this Honorable Court is inclined to grant an *exception* to its Amended Sentencing Scheduling Order, the government does not oppose unsealing the "filed" documents, *if properly redacted*. The government contends that any references to the content of the PreSentence Report (PSR) should be redacted, at this time. The PSR filed by the United States Probation Department is a confidential document. The Supreme Court opined that PSRs

2 In the email from the defense to the Court and the government on November 18, 2014, the government only received six of the twenty items listed in the Chart for Exhibit B.

3 In the email from the defense to the Court and the government on November 18, 2014, the government only received nineteen of the eighty-three items listed in the Chart for Exhibit C.

should be sealed for two reasons: (1) “the fear that disclosure of the reports will have a chilling effect on the willingness of various individuals to contribute information that will be incorporated into the report,” and (2) “the need to protect the confidentiality of the information contained in the report.” *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 12, 108 S.Ct. 1606, 100 L.Ed.2d 1 (1988). There is only a small portion of the Sentencing Memorandum that clearly referenced the content of the PSR.

Additionally, the government contends that the defense should redact any sensitive information or personally identifying information (PII). The Northern District of Texas’s previously enacted privacy policy⁴ provided that “[a]n attorney . . . should not include private or sensitive information in any document filed with the court. . . . In a criminal case, if a home address must be included, only the city and state should be included.”

Additionally, because certain filings:

“may also contain information implicating not only privacy but also *personal security concerns*, an attorney . . . should also exercise caution when filing a document that contains any of the following information:

1. Medical records, treatment, and diagnosis;
2. Employment history;
3. Individual financial information;
4. Proprietary or trade secret information;
5. Information regarding the victim of any criminal activity;
6. National security information;
7. Sensitive security information as described in 49 U.S.C. § 114(s)⁵; or
8. Information regarding an individual’s cooperation with the government.”

[Emphasis added.]

⁴ The government acknowledges that the Privacy Notice was recalled.

⁵ Sensitive security information is actually defined at § 1520.5 of Title 49, Code of Federal Regulations.
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The government recognizes that the District's original Privacy Notice was recalled last year, but it contends that the practice of protecting sensitive information and PII is sound. (see Miscellaneous Order No. 61, "Important Notice to the Members of the Bar," and Fed. R. Crim. P. 49.1(a)).

The government anticipates that many of the assertions in the Sentencing Memorandum will be a topic of testimony during the sentencing hearing. And although there are numerous inaccuracies in the Sentencing Memorandum, those inaccuracies will be addressed and corrected at that time. Because the content of the Sentencing Memorandum will be a topic of testimony during the hearing, the government does not see any harm in unsealing a redacted version of the Sentencing Memorandum and Exhibits A and D.

If the defense seeks to publicize the documents submitted *In Camera* (Exhibits B and C), the government opposes publicizing those documents, without some assertion by the defense that each and every letter-writer consents to the publication, and only after redacting the sensitive information, pursuant to Fed. R. Crim. P. 49.1(a) and this District's sound practice of protecting sensitive information and PII.

In conclusion, the government requests that this Honorable Court consider the argument and authorities set forth above when ruling on the defense's Motion to Unseal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2014, I electronically filed the foregoing document with the clerk for the U.S. District Court, Northern District of Texas, using the electronic case filing (ECF) system of the court. The ECF system sent a "Notice of Electronic Filing" to Brown's attorneys of record Ahmed Ghappour, Charles Swift, and Marlo Cadeddu, who consented in writing to accept this Notice as service of this document by electronic means.

S/ Candina S. Heath
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